Nos. 78-432, 78-435 and 78-436

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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, ET AL.

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER

v.

BRIAN F. WEBER, ET AL.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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The central question in this case is whether Kaiser could lawfully take reasonable race-conscious steps to

remedy the effects of apparent Title VII violations without admitting and proving that it had in fact been guilty of past discrimination.

Respondent does not address this question directly. Instead, he argues (Br. 13-16, 54-58) that this issue is not before the Court because Kaiser's reasons for instituting the affirmative action training programs had nothing to do with remedying arguable past discrimination by the company. Respondent also asserts (Br. 57-58) that Kaiser never analyzed minority employment conditions at the 15 plants included in the programs to determine whether remedial action was necessary.

As he concedes in passing (Br. 13 n.60), respondent's theory of Kaiser's motivations for establishing the affirmative action programs are contrary to the district court's findings. The district court found that Kaiser's "prime motivations" were to avoid litigation by minority employees and to comply with OFCC requirements implementing Executive Order 11246 (Pet. App. 65a). The district court did not dispute that Kaiser had reason to believe that it would be vulnerable to successful Title VII actions or to coercive sanctions under the Executive Order. Even on the sketchy record in this case, the district court concluded that the extreme under representation of blacks in the craft positions at Gramercy "might suggest that Kaiser had discriminated against blacks when filling craft positions" (*ibid.*). But, because Kaiser did not admit and prove its past discrimination, the court held the company's affirmative action measure unlawful (*id.* at 64a-65a, 77a). The court of appeals agreed (*id.* at 17a-23a). Our submission is that these courts applied an erroneous legal standard in holding these programs unlawful.

Respondent contends that the record reflects that Kaiser was totally unconcerned about its vulnerability to coercive Title VII relief and instituted the new training

programs solely to rectify the effects of "societal discrimination." The record, however, shows without ambiguity that Kaiser implemented these programs because, following an analysis of employment conditions at the 15 selected plants, it determined that such remedial measures were required by law.

The 1974 Labor Agreement between Kaiser and the Steelworkers states with clarity the parties' reasons for engaging in affirmative action (A. 135-136):

> As an integral part of 1974 Negotiations, the parties have noted that litigation is pending which may have some bearing on employment conditions for female and minority employees in the bargaining unit. Finally, the parties have considered the impact on seniority systems and job security that technological developments, environmental and economic controls, and widely fluctuating business conditions have had and may continue to have on each employee in the bargaining unit.
>
> By reason of these considerations, the parties have agreed to incorporate into the 1974 settlement this supplemental agreement which will enable the parties quickly and effectively to make adjustments or revisions in their seniority and selection practices when judicial decisions dictate such action is necessary. This supplemental agreement will make it possible for the parties to relate such adjustments or revisions to the circumstances prevailing at the time such action is taken and to the conditions then existing at each location.
>
> A variety of remedial measures may be required by these federal court decisions. In order that both members of the bargaining unit and local management may be made aware of what the courts have required, we cite below some remedial measures

> which may be implemented through mutual agreement if necessary to assure continued compliance with the Acts.

The Labor Agreement then states (A. 137) that a joint company-union committee "will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications in the [15] plants set forth below [including Gramercy], and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio."

Kaiser and the Steelworkers next issued a joint "memorandum of understanding" which established the affirmative action training programs (A. 139-155). The memorandum states that, in compliance with the Labor Agreement, "the Joint Implementation Committee has met to resolve possible inconsistencies with Government and judicial decisions" (A. 139). While not admitting to any past violations of Title VII or Executive Order 11246, the parties stated that affirmative action was necessary "to fully comply with both the letter and the spirit of Title VII of the Civil Rights Act and Executive Order 11246" (*ibid.*). The joint committee "reviewed and/or visited all of the plant sites" covered by the Labor Agreement to determine "the impact, if any, that past or present job placement and/or seniority practices might have on the minority and female employees in the respective bargaining units" (*ibid.*). With respect to craft positions, the memorandum states (A. 144-145):

> As agreed to in the 1974 Master Aluminum and Can and Container Labor Agreements negotiations, the Joint Company-Union Implementation Committee has reviewed all of the existing Trade, Craft, and Assigned Maintenance classifications with respect to their representation of minority and female employees. Said review has determined that, notwithstanding the efforts made by the Company and the Union and/or the gains made via the Company's various Affirmative Action Plans per E.O. 11246, such representation must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions. Consequently, based upon the aforementioned conclusion the parties have agreed to the implementation of the following steps to achieve their desired objective.

The memorandum then sets forth the details of the affirmative action training programs (A. 145-146) and concludes that these programs "should insure the continued compliance by the Company and the Union with the ever-changing status of the law in this area" (A. 146).

Thus, the record is clear that Kaiser and the Steelworkers conducted a self-analysis of minority employment in skilled craft positions at 15 of the company's plants and determined that race-conscious affirmative action was necessary to ensure compliance with the law. The selective references to the trial testimony in respondent's brief (at 56-57) are not to the contrary.[1]

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[1] Respondent quotes statements from the two Kaiser officials who testified that they did not believe that there had been past discrimination at the Gramercy plant. They also stated, however, that Kaiser was aware that a court might not agree and therefore instituted the programs. See our main brief at 10-12. When asked whether the affirmative action programs were prompted by "the experience that the parties to the contracts had had and were having in the field of equal employment opportunity," Kaiser's national director for equal employment opportunity matters responded (A. 97):

> Certainly, it had impact on it. The litigation that the various companies have been involved in, the historical relationships with the Federal agencies that we are all concerned with, certainly, the steel agreement, I think it was our position that we should * * * do those things that are necessary, without having to have it forced down our throat or require us to go into court to comply with the laws of the land.

We recognize that respondent's views as to Kaiser's and the Steelworkers' motivations are now shared by the union (see USWA Br. 77). But the union did not call any witnesses at trial; its present position is not supported by the record; and in the lower courts it argued that the reasons for the affirmative action programs were those we urge now.[2] We think that the question presented in this case was phrased correctly by the Steelworkers in the court of appeals:

> May an employer and union, in collective bargaining, install remedies for *arguable* Title VII violations comparable to those which a court would install if it adjudicated and determined that there *were indeed* such Title VII violations?

Brief for Defendant-Appellant United Steelworkers of America, AFL-CIO, at 2 (emphasis in original). And, for the reasons elaborated fully in our principal brief, we submit that the Steelworkers correctly answered this question below:

> The solution * * * must lie in allowing employers and unions to confer remedial priorities when there is before them substantial evidence indicating a reasonable possibility that their practices will be found unlawful, and that a court would require priority access for "affected class" members as a remedy. Puting it another way, if the evidence suggests that a plaintiff could establish a *prima facie* case and that the defendants do not have an obviously convincing rebuttal, then they should be

[2]In its brief in the court of appeals, the Steelworkers Union stated that the affirmative action programs "were prompted, at least in part, by the parties' perceptions of Title VII requirements as enunciated by the courts and emphasized by the EEOC and OFCC. As one Company witness testified, 'we realized that if we did not do something on our own, then the Government was going to do it for us.' " Brief for Defendant-Appellant United Steelworkers of America, AFL-CIO at 8 (record citations omitted).

> permitted to confer remedial priorities as a court would were it to adjudicate the case and find unlawful behavior
>
> * * * [T]he employer and union in the instant case had before them such evidence, and thus were entitled to act as they did.

Id. at 19-20 (emphasis in original).

Respectfully submitted.

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